

**Diversity News**  
March 2009

**Yvonne:** On January 1, 2009, the Americans with Disabilities Act Amendments Act of 2008, also known as the ADAAA, took effect.

**Thomas:** The measure amends the Americans with Disabilities Act and makes conforming amendments to the Rehabilitation Act of 1973, as amended, that provides legal basis for reasonable accommodation requests made by Federal employees.

**Yvonne:** Here from the Office of Diversity and Inclusion is David Walton, VA's National EEO Manager for People with Disabilities, to talk about how the ADAAA affects VA's reasonable accommodation process.

**David:** We're just going to go over some of the legal and other requirements with regard to reasonable accommodation in the Federal government, the first of which is the Rehabilitation Act of 1973, which provides the major legal underpinning for the accommodation requirement. Of course, there's the ADA and the ADA Amendments Act, which is the focus of this briefing, along with Executive Order 13164, which requires that Federal agencies have written accommodation procedures and, of course, our VA directive on reasonable accommodation, 5975.1, "Processing Reasonable Accommodation Requests from Employees and Applicants." I'm also going to be talking about how the ADA Amendments Act is going to impact that document specifically.

Before I go any further, I need to address who a person with a disability is under the new law. A person with a disability is someone that has a physical or mental impairment, has a record of having that impairment, or is what we call "regarded as" disabled which would be the employee that is treated as if he or she has a disability and may or may not have one.

As I said, the focus of this talk is the Americans with Disabilities Amendments Act that went into effect January 1. One of the critical things that it does it expands the definition of disability. It also expands what we call a major life activity. Major life activities are things like walking, sleeping, eating, breathing, things that are required for us to live day-to-day. It also clarifies that conditions that are in remission currently also qualify under the law as those that require reasonable accommodation and that could be things like cancer, multiple sclerosis, things where the individual wouldn't appear to be disabled if you ran into them on the street. And the other thing to remember is that with the advent of the Americans with Disabilities Amendments Act, the requirements for all simultaneously incorporated into Section 705 of the Rehab Act of 1973, which I mentioned earlier.

One of the things that doesn't change under the Americans with Disabilities Amendments Act: it's still—as it always has been—the employee's responsibility to request accommodation. Now, one of the reasons why this is important is because we don't want to have people jumping the gun or you could possibly get an EEO complaint from someone who says, "You're now treating me as a person with a disability when I don't actually have one." There is one caveat with the employee having to make the request. If the employee doesn't feel comfortable making the request, say they're intimidated by the supervisor, say they have some other concerns, they can have a colleague make the request for them or a family member, that is permissible. But we want to be really careful about making sure that the employee or the employee's representative makes the request. In no way should the supervisor be trying to make the request.

I talked a little bit earlier about the broadening of the definition of disability, now I'm going to talk about some changes to what we call the meaning of "regarded as" disabled and that again is someone who may have been treated as an individual with a disability but does not, in fact, have one. First of all, one of the best things that the new ADA Amendments Act does is it clarifies that we don't have to accommodate an individual who has been regarded as disabled. It also clarifies that in order to qualify under the ADAAA that the impairments have to be permanent in nature, they can't be temporary. Temporary disabilities are under six months. So if it's under six months, although there's nothing that would stop you from accommodating it, you're not required to and that would be something like in the case of an individual that may have broken their wrist, something that's definitely going to heal and improve before it reaches that six-month period.

Now I'm going to talk a little bit more about the major life activities that I addressed earlier. They were walking, sitting, standing, anything that you need to function in your daily life is pretty much going to be on that list. These are some of the activities that were under the previous law and now I'm going to move into some of the activities that are covered under the new law.

You'll see that these activities are much more specific in nature. Now we're talking about things that are in remission, circulatory conditions, cell growth, digestive disorders, auto immune functions. But one important thing that I want to reiterate here is an important change between the old law and the new ADAAA is that the major life activity used to have to provide a demonstrated effect on the individual in order for them to qualify as a person with a disability. Under the new law, that's not true. Let me provide one example that will clarify this for you. If you have an individual that has a prosthetic leg, under the old law that leg wouldn't be considered to limit his or her major life activity of walking because the leg represented a mitigating measure. Under the current law, you can't consider mitigating measures so that individual would still qualify even with a prosthetic leg. The only thing that can be considered under the new law as a mitigating measure would be eyeglasses or contact lenses. So we want to make sure that

we're real clear about that: that you cannot consider the mitigating measures on a major life activity unless it's eyeglasses or contact lenses.

This is a similar definition in the old law and the new law: that with the reasonable accommodation, the individual has to be able to perform the essential job functions of the job compared to what an average person would do. If they cannot do that, just like under the old law, they wouldn't be considered a qualified person with a disability. The interesting thing is going to be how EEOC is going to redefine to some extent what substantially limiting is going to mean. We don't exactly know what the end result of that is going to be.

I'm talking again here about regarded as disabled. Again, I want to reiterate that we don't have to accommodate an individual that does not, in fact, have a disability but an individual can still make a regarded as disabled claim if it impacts their ability to secure a position.

I want to say a few more words about who a qualified person with a disability is, I know I've talked about this a little bit prior, but I want to reiterate this again, and that individual has to be able to perform the essential job functions of the job that are determined by the supervisor and the HR staffing specialist who originally staffed the position. If they cannot perform those essential job functions, then they are not a qualified person with a disability. In addition to being able to perform the essential job functions, the individual would still have to have the same certifications and meet the same, for example, licensing requirements, have the same skill level as a non-disabled individual in that same position.

Here's some of the things that don't change under the ADA Amendments Act. One of the key ones is the meaning of reasonable accommodation. It's still a workplace adjustment that allows an individual with proper accommodation to accomplish the essential job functions of the job. That individual still has to be a qualified individual with a disability, as we talked about earlier, they still have to be able to perform the essential job functions of the job. If they constitute a direct threat to themselves or other individuals in the workplace, if there's a threat of violence or if it's a major health concern, we do not have to provide the accommodation. If making the accommodation would present an undue hardship to the agency, we don't have to make the accommodation. A lot of times, when we talk about the concept of undue hardship, a lot of VA managers have talked to me in the past about, "Well, it's going to cost us so much to accommodate this individual that we shouldn't have to do it." But what people don't realize is that if this issue were ever to go to the EEOC that probably the EEOC judge would not just be looking at the budget of the service where the individual worked. The EEOC judge would also be looking at say for example the budget of that medical center or the budget of VA in total. It would be extremely unlikely that you'd be able to prove undue hardship claim based on financial constraints alone.

Another thing that doesn't change under the new law is our right to get the proper medical information from the individual. If the individual does not provide the manager or the EEO manager or the HR manager who is coordinating the requested materials the proper medical documentation, then the request is going to stop. Only when they provide us the appropriate medical documentation that we're asking for, which would mean that the doctor would then have provided an explanation of what he or she feels is an appropriate accommodation then would the request move forward. The other thing that I want to say here is that we, as always, need to be sure that we are maintaining the confidentiality of any medical information that we do receive, that we limit the number of people that have access to that information to as few as possible.

As I close, I want to just highlight the fact that the EEOC will be issuing additional guidance that's going to define what a substantial limitation is. We don't really expect it to be that much different than what I've discussed but we cannot be sure until the guidance is issued and it may require us to further revise our directive on reasonable accommodation once the guidance comes out. Even though the guidance has not been published, we still have to comply with the new law which is why our revised directive will be available in June.

**Thomas:** For more information on VA's people with disabilities program, visit the Office of Diversity and Inclusion online at the Web address on the screen or contact Mr. Walton by e-mail at [david.walton@va.gov](mailto:david.walton@va.gov).

**Yvonne:** That's all we have for this edition of Diversity News. We appreciate your watching, and we hope you'll tune in again next month. Until then, for more frequent updates of diversity news, sign up for our free weekly e-mail news service: NewsLink. Just send an e-mail message to the address shown below with the words "Subscribe News" in the subject line.

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**Yvonne and Thomas:** Have a GREAT month!